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No. 83-1982

In the Supreme Court of the United States

OCTOBER TERM, 1984

LUIS OSCAR SARMIENTO-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court abused its discretion in admitting cocaine into evidence because the government failed to establish a proper chain of custody.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing cocaine with intent to distribute and one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of five years' imprisonment and a ten-year special parole term, and fined $30,000. The court of appeals affirmed (Pet. App. 1-7; 724 F.2d 898).

The evidence at trial showed that petitioner, together with Roberto Aguilar and Lauro Ybanez, attempted to sell 2.7 pounds of cocaine, worth $100,000, to undercover agents of the Drug Enforcement Administration on November 2, 1978. Aguilar and Ybanez met with the agents in a

hotel room and agreed on the terms of the sale. Following a phone call, the two left and proceeded, under surveillance, to rendezvous with petitioner and retrieve a small light-colored box from the trunk of petitioner's car. Petitioner drove away, and Aguilar and Ybanez returned to the hotel room carrying a small "Lady Schick" box, which they handed to the agents. Inside were two plastic bags containing the amount of cocaine specified in the agreement. Pet. App. 3-4. Aguilar and Ybanez had been gone from the hotel room for a total of 10 or 15 minutes (4 Tr. 32; 5 Tr. 104).

The box and the two bags of cocaine were seized and placed in a DEA safe, where they remained until the bags were sealed in an exhibit bag and sent to a DEA laboratory for analysis. A DEA chemist removed the cocaine and forwarded the bags to the Federal Bureau of Investigation for fingerprint analysis. After determining that the substance contained in the bags was indeed cocaine, he placed it in two new plastic bags and put those back into the exhibit bag, which he then heat-sealed. This bag was offered and admitted at petitioner's trial. Pet. App. 4; see 5 Tr. 123, 128-129, 149-150, 201-207, 214.

The district court determined that the government had adequately established the chain of custody of the cocaine (2 Tr. 256). The court of appeals agreed, concluding that petitioner's argument went to the weight of the evidence, not its admissibility, and that the district court's decision was within its broad discretion over the admission of evidence at trial (Pet. App. 5-6).

2. Petitioner claims (Pet. 13-20) that the government failed to establish the chain of custody of the cocaine sufficiently to justify its admission at trial. The court of appeals correctly determined that the district court did not abuse its discretion in admitting this evidence, and its decision does not conflict with any decision of this Court or any other

court of appeals. Review of petitioner's fact-bound contention is therefore unwarranted.[1]

The law is settled that physical evidence may be admitted where there is a reasonable probability that it is in substantially the same condition in all important respects as when the crime was committed. See, *e.g.*, *United States* v. *Garcia*, 718 F.2d 1528, 1533-1534 (11th Cir. 1983); *United States* v. *Jackson*, 649 F.2d 967, 973-974 (3d Cir.), cert. denied, 454 U.S. 871 (1981); *United States* v. *Brewer*, 630 F.2d 795, 802-803 (10th Cir. 1980).[2] It is equally settled that the district court's decision to admit evidence will be sustained absent an abuse of discretion and that, in the absence of facts to the contrary, courts will assume that government officials did not tamper with evidence. See, *e.g.*, *United States* v. *Luna*, 585 F.2d 1, 6 (1st Cir.), cert. denied, 439 U.S. 852 (1978); *Brewer* v. *United States*, 353 F.2d 260, 262-263 (8th Cir. 1965).

The court of appeals simply applied this law to the facts of this case. See Pet. App. 5-7. Petitioner cites no fact suggesting that the cocaine introduced at trial was not the same substance seized from his accomplices. *United States*

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[1]Petitioner makes a related claim (Pet. 16) that the cocaine was irrelevant and hence inadmissible because the government "failed to connect" it to him. As the court of appeals recognized (Pet. App. 6), this argument is plainly without merit in light of "the overwhelming circumstantial evidence connecting [petitioner] with the cocaine." Petitioner admitted to a cellmate that he had been involved in a drug transaction and that the cocaine had been in his car or its trunk (*id.* at 5). There was also evidence that he had driven his car on the night of the transaction and that he asked his wife to lie to law enforcement officers on his behalf (*ibid.*). Moreover, as the district court noted (2 Tr. 255-256), there was evidence suggesting that petitioner had been responsible for weighing the cocaine and delivering it to his accomplices. See also Pet. App. 7.

[2]Once the judge makes the determination of admissibility, the question of the weight to be accorded the evidence is left to the jury. See Fed. R. Evid. 104(b) & advisory committee note.

v. *Lane*, 591 F.2d 961 (D.C. Cir. 1979), which petitioner argues (Pet. 13-15) is in conflict with the decision below, in fact is fully consistent with it. The court in *Lane* set forth and applied the same principles as did the court in this case. See 591 F.2d at 962-963. Indeed, the chain of custody of the heroin in *Lane* —to a DEA safe, then to a DEA chemist, and then into sealed envelopes — is in large part similar to that presented here. Both courts upheld the admission of the evidence; the claim of conflict is meritless.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[3]Petitioner's claim (Pet. 18-19) that the decision below conflicts with two cases cited in *Lane* is equally unconvincing, as it ignores the failure of the government in those cases to lay an adequate foundation for the admission of the evidence. Here, on the other hand, the government clearly made a sufficient showing of an uninterrupted chain of custody to justify admission of the cocaine. Petitioner notes (Pet. 10) that the government withdrew its offer of the "Lady Schick" box and that it never offered the plastic bags in which the cocaine was originally found. The court of appeals correctly concluded (Pet. App. 6), however, that the original containers were unnecessary in light of the other evidence establishing the chain of custody and connecting the evidence to petitioner. Petitioner cites no case in conflict with this wholly reasonable result.

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